United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

570

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22712

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT M. PETTY,

Appellant.

Appeal From the United States District Court

for the District of Columbia

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Washington, D. C. 20036
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(Appointed by this Court)

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OTHER AUTHORITIES:

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STATEMENT OF ISSUES PRESENTED

1. Whether the trial court erred in allowing two Government witnesses to make an in-court identification of appellant?

2. Whether, applying the standards of Simmons v. United States, 390 U.S. 377 (1968), identification of appellant by means of photographs shown to the robbery victims amounted to violations of due process as required by the Fifth Amendment to the Constitution of the United States?

This case has not previously been before this Court under this or similar title.

STATEMENT OF THE CASE

On April 29, 1967, two men entered the Red Star Market in the District of Columbia and robbed the two brothers who were the proprietors of the store. One of the brothers followed the two men out of the store and saw them drive away from a nearby alley. The crime was immediately reported to the police.

The next day, April 30, 1967, robbery squad detectives returned to the store and showed the brothers, Harry and Charles Mostow, eight to ten photographs of suspects. Appellant's photo was included. Appellant was identified by each brother as one of the two men who robbed their store and a warrant was issued for appellants' arrest.

Almost a year later, on February 8, 1968, appellant was apprehended by two robbery squad detectives at 6th and F Streets, Northwest, in the District. On February 20, 1968, the Mostow brothers were taken by robbery squad detectives to a hearing before the United States Commissioner where they were seated on different sides of the room and told to keep an eye out for the subject and to give a signal if one or the other spotted him. Three or four men came out of the door before appellant, but appellant was identified by each when he appeared.

On March 4, 1968, the Grand Jury returned an indictment charging appellant with two counts of Robbery in violation of 22 D.C. Code 2901 1/ and two counts of Assault with a Dangerous Weapon in violation of 22 D.C. Code 502 2/.

Trial by jury was held on November 21, 25 and 26, 1968, before the Honorable Judge Gasch. Before trial, the Court held a lengthy hearing on Wade 3/-Gilbert 4/-Stovall 5/ and Simmons 6/ issues.

1/ Whoever by force or violence, whether against resistance or by sudden or stealthy seizure, or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

2/ Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

3/ United States v. Wade, 388 U.S. 218 (1967).

4/ Gilbert v. California, 388 U.S. 263 (1967).

5/ Stovall v. Denno, 388 U.S. 293 (1967).

6/ Simmons v. United States, 390 U.S. 377 (1968).

This hearing resulted in the Court's suppressing as "irregular" testimony relating to the February 20, 1968 confrontation in the U. S. Commissioner's hearing, but allowing the Mostow brothers to make in-court identifications despite this suppression. This confrontation in the Commissioner's office was found to be highly suggestive and not at all commensurate with proper lineup procedures.

Both Mostows testified at trial about the robbery, interrogation by detectives the next day, and identifying appellant by photos shown to them. Both identified appellant in court and neither mentioned the hearing before the U. S. Commissioner on February 20, 1968. A robbery squad detective also testified about showing the Mostow brothers certain photos.

Appellant called no witnesses and was found by the jury gilty of all four counts. On January 10, 1969, he was sentenced to 3 to 12 years on the robbery counts, and 2 to 10 years on the assault counts, "said sentences by the Courts to run concurrently."

On January 10, 1969, appellant executed a notice of appeal and present counsel were subsequently assigned to represent him.

ARGUMENT

I

Appellant urges as the first major trial error the Court's permitting the Mostow brothers to make an in-court identification of appellant. Appellant objects to this in-court identification as flagrantly tainted by the circumstances of the confrontation before the United States Commissioner on February 20, 1968.

In a pretrial hearing held to determine the admissibility of certain identification testimony, the Court found that this February 20, 1968 confrontation was sufficiently irregular as to bar trial testimony relating to it. The robbery occurred in April of 1967. Appellant was not arrested until February of 1968 and trial was not held until November of 1968. Thus, a period of more than a year and one half elapsed between the robbery and the witnesses' in-court identification of appellant.

There can be no question that the interim opportunity given to the complaining witnesses to view appellant under highly suggestive circumstances made the in-court identification far more positive in their minds. Appellant urges that this case be remanded for a new trial at which no in-court identification will be allowed.

At page 126 of the transcript the Court questioned Harry Mostow about whether his ability to identify the defendant in court was predicated upon what he saw at the United States Commissioner's office or whether it was predicated upon his remembering the defendant from seeing him at the store in April of 1967. The witness

obviously felt that both contributed to his ability to recognize appellant because the witness began to say "could both have fitted in a continuation . . . ." The Court cut him off at this point and the witness answered that "it could be from the one in my store, too." The clear implication of this questioning is that the witness's ability to recognize appellant was primarily from the confrontation at the United States Commissioner's office on February 20, 1968.

At page 127 of the transcript the Court continued to question the witness. The Court asked, "which instance makes the clearer impression on you?" Answer. "Can I say both are equal?" The witness went on to say that they both could have been about equal and that they could have brought back what it was he had in his mind at the holdup.

The above questions were all asked at the pretrial hearing held by the Court on the issue of suppression of identification testimony.

The crucial question pertinent to the issue of in-court identification is whether, applying the principles of United States v. Wade, 388 U.S. 218 (1967), the Government can establish "by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." (388 U.S. at 240) Thus, the in-court identification must have "independent origin". (380 U.S. at 242) United States v. Clark, 289 F.Supp. 610, 623-630 (E.D. Pa. 1968); Palmer v. Peyton, 359 F.2d 199 (1966); Foster v. California, U.S. _____, 22

L.ed.2d 402 (1969); Clemons v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____, No. 19,846 (Dec. 6, 1968).

United States v. Washington, 292 F.Supp. 284 (D.C.D.C. 1968), involved a hearing held by Judge Youngdahl to determine whether certain identification testimony should be suppressed. Judge Youngdahl stated (page 289) that "on the basis of its experience this Court questions whether, in cases involving serious time lapses, the Government can ever meet its burden of establishing by clear and convincing evidence that an in-court identification would have a source independent of a prior due process violation in the identification process." This is precisely the point appellant is arguing here; the illegal and irregular confrontation before the United States Commissioner on February 20, 1968, whereat the complaining witnesses were given the opportunity to view the principal suspect (appellant) whom they had not seen in almost a year, so refreshed their memory about appellant's identify as to make the in-court identification impermissibly suggestive. The net result of this illegal confrontation was effectively to deny appellant his constitutional right to cross-examination of and confrontation with opposing witnesses in violation of the Sixth Amendment.7/

Both the Wade and Gilbert cases hold that where there has been an illegal pretrial confrontation there is called into question the admissibility at trial of the in-court identifications of the

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7/ "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ."

accused. The Supreme Court stated that the determination as to whether the in-court identification had a sufficiently independent basis was a question to be determined in the first instance by the trial court. Appellant submits that the time lapse in that instant case will permit of no other conclusion than the in-court identification was so tainted by the illegal pretrial confrontation as to render it inadmissible, and that the prejudice flowing from the Court's improper ruling was of such magnitude as to require a new trial.

II

Appellant urges as the second major trial error the admission of testimony relating to the Mostows' identification of appellant by means of photographs shown to them on the day after the robbery. It is not clear whether these photographs had numbers on them which would indicate a past criminal record. (Appellant's trial counsel maintained in a Motion for Judgment of Acquittal that the photographs did have criminal numbers on them when shown to the witnesses.) It is not clear whether the other faces bore a sufficient resemblance to appellant as to comport with the requirements of due process. Because of these above contentions, appellant submits that the case should be remanded for a new trial at which time the Government should be required to produce these photographs for a determination of whether their exhibition by the Mostows fulfilled the requirements of Simmons v. United States, 390 U.S. ---- (1968).

At page 24 of the transcript the detective from the robbery squad testified in response to a question by the Assistant U. S. Attorney about how the persons in the photographs compared with reference to age, height, weight and facial characteristics. The detective answered that the "other photographs in the group . . . are all fairly much in the same age bracket." He could not compare them as to height, weight or facial characteristics and said nothing further other than that they were all Negro. This is a totally inadequate response.

At page 27 of the transcript the defense attorney brought out that the detective was told in the course of his investigation that one suspect had a mustache. Yet, only 5 of the 9 photographs were of men with mustaches.

The lead case on the admissibility of testimony based on photographic identification is Simmons v. United States, 390 U.S. 377 (1968). Applying the standards of that case, appellant submits that this cause should be remanded for a new trial to determine whether there was sufficient compliance with them. The Supreme Court noted in Simmons that improper employment of photographs by police may sometimes cause witnesses to err in identification of criminals. "Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification." (390 U.S. at 383) Clemons v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____, No. 19,846 (Dec. 6, 1968).

The key holding in Simmons was that each case must be considered on its own facts, "and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Also, Jones v. United States, _____ U.S. App. D.C. _____, 402 F.2d 639 (1968). The photographic identification procedure in this case was clearly inadequate. To fail to show that the other faces on the remaining photographs sufficiently resembled appellant deprives him of his rights of due process under the Fifth Amendment.8/

United States v. Trivette, 284 F.Supp. 720 (D.C.D.C. 1968), was similar in that the victim of a robbery was immediately shown numerous photographs of suspects and identified one in particular. Several days leter the victim was allowed to identify the suspect at a "one-man show up," a situation which resulted in a deprivation of due process. Appellant points out that at page 723 the Court observed that "[i]deally, once the suspect is initially identified by picture he should later be displayed in a physical lineup, thus permitting the photographic identification to be supplemented by corporeal identification which adds another significant dimension." The Court in the Trivette case sought to determine whether in spite

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8/ "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

of the due process violation the victim could still make an in-court identification. The victim's hestitation on the stand in response to this question (see page 724) was very similar to the response given by Harry Mostow to a similar question by the Court below. (Tr. 126-127) The Court went on to allow the in-court identification whereas the Court in Trivette found that the unsureness of the victim's response coupled with the effect of the subsequent improper identification made it impossible for the Court to uphold the in-court identification based on the witness's observations during the robbery.

Courts have repeatedly held that when photographs of suspects are shown to witnesses the photos must be of people who bear a substantially similar resemblance to the suspect. Saville v. United States, 400 F.2d 397 (1968).

III

Appellant urges as the third major trial error the unjustifiable failure of the police to hold a lineup. Considering both the circumstances of the robbery and the lapse of time between the robbery and appellant's apprehension, it was inexcusable for the police to fail to hold a lineup. The situation presented here is ideally suited for lineup identification. This unjustifiable failure to hold a lineup deprived appellant of due process of law in violation of the Fifth Amendment to the Constitution of the United States. Appellant agrees with Chief Judge Bazelon's holding on this point as expressed in his dissent in Wright v. United States,

_____ U.S. App. D.C. _____, 404 F.2d 1256, 1262 (1968).

I believe that due process is violated whenever the police unjustifiably fail to hold a lineup. Since mistaken identifications are probably the greatest cause of erroneous convictions, we must require the fairest identification procedures available under the circumstances. With the stakes so high, due process does not permit second best.

CONCLUSION

Appellant respectfully submits to the Court that this case should be remanded for a new trial at which any in-court identification would be suppressed. Appellant's position is that the illegal confrontation before the United States Commissioner on February 20, 1968 "tainted" the in-court identification to such a degree as to render the admission of this testimony unconstitutionally prejudicial to appellant. Further, counsel submit that the Court should require the District Court at re-trial to hold a hearing on the photographic identification and require the Government to show that the other faces sufficiently resembled appellant's as to comport with Simmons standards.

Respectfully submitted,

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Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I, Robert R. Redmon, have delivered a typed stencil of this brief to the Clerk of the Court, and that said Clerk has indicated by letter that a finished copy of the brief will be served on the United States Attorney.

Robert R. Redmon